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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

*Appellants,*

v.

MARTIN CROMARTIE, *et al.*,

*Appellees.*

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On Appeal from the United States District Court for the Eastern District of North Carolina

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## BRIEF *AMICI CURIAE* OF CONGRESSWOMAN CORRINE BROWN, CONGRESSMAN JOHN LEWIS, CONGRESSWOMAN CYNTHIA McKINNEY, AND THE DEMOCRATIC CONGRESIONAL CAMPAIGN COMMITTEE SUPPORTING APPELLANTS

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J. GERALD HEBERT
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585

PAUL M. SMITH*
DONALD B. VERRILLI, JR.
HEATHER K. GERKEN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Counsel of Record

November 10, 1998

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## INTEREST OF AMICI

Congresswoman Corrine Brown, Congressman John Lewis, and Congresswoman Cynthia McKinney represent congressional districts in states in which a districting plan has been challenged under *Shaw v. Reno*. The Democratic Congressional Campaign Committee is the political organization for Democratic Members of the United States House of Representatives and is responsible for assisting Democratic candidates running for election to the House.[1]

While the interests of the congressional representatives from North Carolina are being fully represented by appellants, *amici* also have a direct interest in the standards that may be established in this case to guide the future creation of congressional districts. Although *amici* certainly do not agree with all that this Court has said in the *Shaw* line of cases, they file this brief not in order to carry on that dispute, but because this case provides an opportunity for the Court, consistent with *Shaw*, to clarify the applicable law in advance of the next round of redistricting and the onslaught of legal challenges that will surely follow. This brief offers a workable framework for dealing with racial gerrymandering claims like the one before this Court. It offers a simple test for determining whether a challenged district is presumptively constitutional. Although the presumption proposed in this brief is implicit in this Court's prior decisions, *amici* respectfully urge this Court to recognize it expressly in order to provide much-needed guidance to states and courts as they gear up for the redistricting that will take place after the 2000 Census.

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[1] Counsel for *amici* authored the entire brief, and no party other than *amici* has made a monetary contribution to the preparation or submission of the brief. Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

## SUMMARY OF ARGUMENT

1. *Shaw v. Reno*, 509 U.S. 630 (1993), addressed certain types of "expressive" and "representational" harms thought to arise from the deliberate creation of majority-minority districts. Two undisputed features of North Carolina's District 12, as drawn by the state legislature in 1997, present virtually insuperable barriers to those who would label the district as a continued example of "racial gerrymandering" proscribed in *Shaw*: (1) the supposedly favored racial group does not have a controlling electoral majority, and (2) the district lines were drawn using precincts -- a geographic unit that, like census tracts but in contrast to much smaller census blocks, promotes compactness and allows for reliance on nonracial data.

To begin, even assuming that the North Carolina General Assembly deliberately made some effort to group together a substantial number of African-Americans in District 12, it stopped short of providing them a controlling electoral majority, creating instead a district where African-Americans must "pull, haul, and trade" in order to elect their candidate of choice. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). That is significant because such a district rarely, if ever, implicates the harms *Shaw* addresses. It does not, as the Court found to be the case with certain deliberately created majority-minority districts, "convey the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion). Nor does it suggest to elected representatives "that their primary obligation is to represent only the members of [the allegedly favored racial minority], rather than their constituency as a whole." *Shaw v Reno*, 509 U.S. at 648.



Indeed, such districts are more likely to signal political integration than racial division. They confirm "the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups." *DeGrandy*, 512 U.S. at 1020; *see also Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997) (such a district "'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office") (citation omitted). Moreover, without conveying any of the messages that troubled the Court in *Shaw*, the creation of such districts does much to facilitate meaningful interracial coalition building. That is presumably why the Court has consistently declined to invalidate majority-white districts drawn to include a substantial minority population. *See, e.g., Lawyer*, 117 S. Ct. at 2195 (upholding district with 36% minority population); *Quilter v. Voinovich*, 118 S. Ct. 1358 (1998), *summarily aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) (three-judge court) (declining to apply strict scrutiny to four districts where minority voters did not constitute a majority); *DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court) (declining to apply strict scrutiny to California's 52 congressional districts, 17 of which were majority-white districts containing a minority population that exceeded 35%).

2. There is even less cause for constitutional concern where, as here, a district is drawn using sensible, organic geographic units like precincts or census tracts. Use of such geographic units mitigates the concerns raised by reliance on smaller units like census blocks, for which only racial data is available. *See Bush*, 517 U.S. at 961-64, 966-67, 972-76 (plurality opinion). Census tracts and precincts allow redistricters to use appropriate information in drawing lines, help ensure that voters are grouped sensibly, tend to promote

compactness, and are large enough to prevent the extraordinarily detailed race-based line-drawing that can occur when census blocks are used as the foundation for a districting plan. Thus, use of such geographic units guards against the appearance that race has been employed for its own sake or as a proxy for political behavior. These facts strongly support this Court's pattern of rejecting constitutional challenges to districts drawn using whole census tracts while invalidating some challenged districts drawn at the census-block level. Accordingly, *amici* urge this Court to recognize a strong presumption of constitutionality where, as here, a state has used appropriate geographic units to create a district in which the supposedly favored group does not enjoy a controlling electoral majority, but must instead work with other racial groups to pursue shared goals.

3. Only the most egregious example of race-based line-drawing could overcome such a presumption. The facts of this case do not come close to satisfying that standard. To the contrary, the bulk of the departures from traditional districting practices identified by the three-judge court -- the elongated shape of the district, the splitting of counties, etc. -- stemmed primarily from the difficulties inherent in creating a Democratic-leaning district in the Piedmont region of North Carolina. That fact is confirmed by the plan ultimately approved by the three-judge court. District 12 in the 1998 court-ordered plan retains all of these basic features, and any "improvements" over the 1997 legislative plan came at the expense of substantially *weakening* Democratic voting strength. As to the remaining examples of race-based line-drawing identified by the District Court, they reveal only that the court substituted its own intuitions about redistricting for the politically informed judgments of the General Assembly and premised *Shaw* liability



upon its quarrel with a handful of the State's line-drawing decisions. The Court should, accordingly, reverse.

## ARGUMENT

This case presents an excellent opportunity to provide needed guidance to states and courts about the proper application of *Shaw v. Reno* and its progeny in the upcoming round of redistricting following the 2000 Census. In many significant respects, the North Carolina legislature in 1997 faced a task that mirrors the problems that will confront other states in 2001. In redrawing its congressional district lines, the State chose to try to maintain the existing partisan balance and seniority of its congressional delegation by preserving the geographic cores of all existing districts. Thus, in creating the new District 12, the legislature endeavored to eliminate features that this Court had found to reflect excessive reliance on race, while retaining a district that was predominantly Democratic and offered the incumbent congressman the same opportunity for reelection being granted to all other incumbents around the State. In determining whether the State achieved its goals in a constitutional fashion, the Court can give great assistance to other states that will inevitably face similar quandaries two years down the road. For the reasons stated here, *amici* believe that this case provides an illustration of how states can avoid violating *Shaw* even as they continue to make legitimate efforts to create districts in which minority voters have an equal opportunity to participate in the political process and to elect candidates of their choice.

## I. TWO UNDISPUTED CHARACTERISTICS OF DISTRICT 12 SHOULD CREATE A STRONG PRESUMPTION AGAINST A FINDING OF A RACIAL GERRYMANDER.

### A. A State's Decision to Draw a District Creating a Reasonable Opportunity for the Formation of Successful Interracial Coalitions Is Not Generally Problematic Under the Equal Protection Clause.

*Shaw v. Reno* addressed certain types of "expressive" and "representational" harms that this Court held can arise from the deliberate creation of majority-minority districts. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995); *see also Bush*, 517 U.S. at 980-81, 984 (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 926-27 (1996). It thus requires the application of strict scrutiny only where race has "predominated" -- that is, where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). *Shaw* has been limited in this fashion based on the Court's recognition that it is entirely legitimate to give some weight to racial considerations in drawing districts, including majority-minority districts. *See Bush*, 517 U.S. at 958 (plurality opinion) (strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts"); *id.* at 995 (O'Connor, J., concurring) (*Shaw* is aimed at "distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses"); *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) (*Shaw* applies only to "extreme instances" of gerrymandering).

This case involves allegations that the State made deliberate efforts to group together African-Americans in District 12. The fact that their voting share nevertheless fell short of a majority



should be given substantial weight in the "predominance" inquiry under *Shaw* and *Miller*. Until now, the Court has applied strict scrutiny only to certain deliberately created majority-minority districts. It has consistently declined to invalidate districts where the minority population constituted less than 50% of the population.[2] Moreover, just last Term the Court observed that "[t]he fact that [a challenged district] is not a majority-black district . . . . supports" a decision not to subject the district to strict scrutiny. *Lawyer*, 117 S. Ct. at 2195.

The distinction implicitly drawn by the Court provides a potentially useful basis for limiting and clarifying the scope of the *Shaw* doctrine. Districts like District 12 -- where African-American voters are grouped together to the point where they have substantial electoral power but not unilateral electoral control -- rarely, if ever, cause representational or expressive

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[2] *Compare Shaw v. Hunt*, 517 U.S. at 905-06 (invalidating districting plan whose "'overriding purpose'" was the creation of a district with an African-American voting majority) (citation omitted), *Bush*, 517 U.S. at 972-73 (plurality opinion) (invalidating "exceptional" majority-minority district whose "shape was essentially dictated by racial considerations"), *Miller*, 515 U.S. at 918 (invalidating majority-minority district when it was "'undisputed that [the district] is the product of a desire by the General Assembly to create a majority black district'") (citations omitted), *Silver v. Diaz*, 118 S. Ct. 36 (1997), *summarily aff'g* 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court) (invalidating majority-minority district), *and Meadows v. Moon*, 117 S. Ct. 2501 (1997), *summarily aff'g* 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court) (invalidating majority-minority district), *with Lawyer*, 117 S. Ct. at 2195 (upholding district in part because it was not a majority-minority district), *Quilter v. Voinovich*, 118 S. Ct. 1358 (1998), *summarily aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) (three-judge court) (declining to apply strict scrutiny to four districts where minority voters did not constitute a majority), *and DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court) (declining to apply strict scrutiny to California's 52 congressional districts, 17 of which were majority-white districts containing a minority population that exceeded 35%).

harms.[3] Almost by definition such a district cannot impose representational harms on non-African-Americans because African-Americans do not constitute a majority by any measure. It is therefore unlikely that its elected officials will "believe that their primary obligation is to represent only the members of [the minority] group, rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. at 648; *see also Hays*, 515 U.S. at 744.

Similarly, such districts rarely, if ever, result in expressive harms because they do not "convey the message that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980 (plurality opinion); *see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 506-16 (1993). This is not a case where the General Assembly "foreordain[ed] that one race be the majority." *Bush*, 517 U.S. at 996 (Kennedy, J., concurring). Indeed, the fact that the allegedly favored group does not enjoy a controlling electoral majority distinguishes this case from those in which this Court concluded that unilateral control by the favored race was a criterion that "could not be compromised." *Shaw v. Hunt*, 517 U.S. at 907.

[3] *Amici* do not wish to discourage the creation of majority-minority districts or suggest that they should generally be treated differently from majority-white districts. *See Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (noting that *Shaw* does not impose a racial double standard); *Bush*, 517 U.S. at 996 (Kennedy, J., concurring) (same). To the contrary, as we noted at the outset, *supra* p. 6, most majority-minority districts are not themselves properly subjected to strict scrutiny, and this Court certainly should not establish any standard that would deter creation of the kind of reasonably compact majority-minority districts often required by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Moreover, *amici*'s proposal to accord somewhat different treatment to more extreme efforts to group together minority voters -- based on whether or not those efforts produce a majority-minority district -- merely reflects the inherent logic of the *Shaw* lines of cases. In keeping with the Court's view that "reapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. at 647, *amici* simply urge this Court to recognize that the message sent by the 1997 legislative plan is different from the one this Court found to be conveyed by the plan invalidated in *Shaw v. Hunt*.

Finally, the distinctions *amici* urge this Court to acknowledge should, of course, apply equally when states make deliberate efforts to group together *whites*. Thus, a bizarrely shaped majority-white district carved out of an area where one would expect, *ceteris paribus*, to find a majority-minority district would *not* be entitled to the presumption outlined in this brief. It would instead be subject to the same level of scrutiny that the Court has applied to a bizarrely shaped majority-minority districts drawn from majority-white areas.



Even when districts like District 12 are purposefully created to augment minority voting power, their creation is necessarily premised on the assumption that "minority citizens are able to form coalitions with voters from other racial and ethnic groups." *DeGrandy*, 512 U.S. at 1020.[4] They thus convey the message that members of all races will "pull, haul, and trade to find common political ground, the virtue of which is not to be slighted" for those who hope to "hasten the waning of racism in American politics." *Id.* These districts also "'offer to any candidate, without regard to race, the opportunity' to seek and be elected to office," *Lawyer*, 117 S. Ct. at 2195 (citations omitted), and signal legislative trust that the candidate elected will adequately represent voters of all races. In short, districts like District 12 defy the very stereotypes *Shaw* sought to combat.

[4] *Amici*, to be sure, do not mean to suggest that interracial coalition building cannot occur in majority-minority districts. It clearly does occur. But when a state has carved a bizarrely shaped majority-minority district out of a predominantly white area, *Shaw* indicates that such a district sends a different message about the importance of race than either a compact majority-white district drawn in that area or a compact majority-black district drawn elsewhere.

Not only do these districts convey a message of racial cooperation, they also help make this worthwhile goal a reality by encouraging interracial coalition building. First, including a sizeable concentration of minority voters in the same district makes it easier for them to participate in the political system. It facilitates efforts to "recruit[] and nurture[]" candidates and makes "grassroots organizing and campaigning . . . more viable." *DeWitt*, 856 F. Supp. at 1414. Second, by ensuring that a minority group is large enough to wield political clout during an election, it creates incentives for elected officials and nonminorities to work with that group to achieve shared agendas. Meaningful cross-racial alliances are far less likely to arise if minority voters are scattered among several districts because they will not be a significant enough political force in any single district to engage in such coalition building. For these reasons, districts like District 12 are "to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions." *Uno v. City of Holyoke*, 72 F.3d 973, 991 (1st Cir. 1995). They thus "bring us closer to 'the goal of a political system in which race no longer matters.'" *Id.* (quoting *Shaw v. Reno*, 509 U.S. at 657).[5]

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[5] A state's interest in grouping together sizeable clusters of minority voters is most substantial where, as here, voting is strongly polarized. *See* Affidavit of Gary Bartlett, Vol. 4, Attachment 97C-28F-3B (Engstrom Report). The Court has long recognized that polarized voting can routinely defeat the preferences of minority voters at the polls. *See Thornburg v. Gingles*, 478 U.S. 30, 52-77 (1986); *Davis v. Bandemer*, 478 U.S. 109, 151 (1986) (O'Connor, J., concurring) ("As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process."). Depending on the level of racial polarization, minority groups that are too small to constitute a voting majority can nevertheless elect their candidate of choice with the help of white cross-over voting, *provided that they are large enough to do so. See Gingles*, 478



The concept of "coalition building," to be sure, may imply that groups, whether defined by race or by some other shared trait, perceive themselves as having a common interest and sometimes wish to work together to achieve a shared goal.[6] But even when a state deliberately sets out to draw such districts, the very premise of their creation is that the interests shared by minority voters do not override all others and are, indeed, shared by at least some white voters. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1864 (1992) ("Ideally, politics should be a deliberative process in which cross-cutting alliances will be formed on an issue-by-issue basis and in which race will not serve as the overriding cue for voting behavior.") (footnote omitted). Thus, the means chosen by the State to promote integrated electoral politics goes far to ensure that the district in question does not signal "that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980 (plurality opinion). As this Court observed in *Lawyer*, "[t]he fact that [the challenged district] is not a majority black district . . . . *supports*" a decision not to subject it to strict scrutiny. *Lawyer*, 117 S. Ct. at 2195 (emphasis added); *see also id.* (Court has "never recognized similar racial composition of different

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U.S. at 85-87 (O'Connor, J. concurring) (noting that the percentage of African-American voters needed to elect their candidate of choice depends on levels of polarization). Thus, even in cases where a minority group cannot form a reasonably compact majority and Section 2 of the Voting Rights Act may not apply as a formal matter, the equal-protection concerns that animate that statute surely would justify a state's efforts to assure that minority voters play a meaningful role in the democratic process.

[6] That view is amply confirmed by the record, which makes clear that African-Americans vote cohesively. Affidavit of Gary Bartlett, Vol. 4, Attachment 97C-28F-3B (Engstrom Report).

political districts as being necessary to avoid an inference of racial gerrymandering in any one of them").

In evaluating the State's compliance with the Equal Protection Clause, the Court should give considerable weight to the fact that districts like District 12 generally do not convey the type of message that concerned the Court in *Shaw*. As this Court has emphasized, "reapportionment is one area in which appearances do matter." *Shaw v. Reno*, 509 U.S. at 647. For this reason, only the most egregious departures from traditional districting practices could overcome the otherwise permissible message that such districts generally convey. They could properly be treated as "racial gerrymanders" only where a state's line-drawing decisions convey an unmistakable message that race was the only thing that mattered.

### B. A State's Use of Precincts or Census Tracts as the Foundation for its Redistricting Plan Further Strengthens the Presumption of Constitutionality.

Any standard for evaluating a state's redistricting choices must reflect the realities of redistricting in the computer age. In drawing districts with the aid of computers, a state selects a geographic unit as the foundation for its redistricting plan — be it a census block, census tract, or precinct[7] — and gradually adds to the selected core, unit by unit, until the appropriate population level has been attained. A state's choice of a foundational unit can have a profound effect on the way voters are grouped and the resulting shape of the district. That fact is confirmed by the decision in *Bush*, where the Court roundly

[7] A census block is a much smaller geographic unit than either a precinct or a census tract. In North Carolina a typical precinct or census tract contains roughly 100 to 150 census blocks. *Infra* p. 16.



condemned the State's use of census blocks as the basic unit for redistricting. *See Bush*, 517 U.S. at 961-64, 966-67, 972-76 (plurality opinion).

The *Bush* Court identified two problems with census blocks, which are generally identical to city blocks and, on average, contain only a few dozen residents. First, at the census-block level, only total population and racial data are available to redistricters, thus leading the state to focus too heavily on race in drawing lines. *Id.* at 961-62 (availability of racial data at block level "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"). Second, these units are small and manipulable, thereby allowing for surgical line-drawing separating voters by race. Their use thus tends to result in extremely jagged district boundaries that convey the unmistakable message that race was the state's overriding redistricting concern. *Id.* at 973-76 (boundary lines that "interlock 'like a jigsaw puzzle'" and "correlate almost perfectly with race" are "'unexplainable on grounds other than racial quotas established for those districts'") (citations omitted). Perhaps for this reason, *every* district that this Court has invalidated under *Shaw* has been drawn using census blocks.[8]

[8] In addition to *Bush*, the Court struck down the original North Carolina District 12, where census blocks were used "as basic building blocks in the redistricting process." *Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) (striking down District 12). Similarly, in *Miller* the Court invalidated a district where the legislature split precincts in order to include African-American voters in the challenged districts and engaged in a "block by block search for black voters to add to the [district]." *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995). *See also Silver v. Diaz*, 118 S. Ct. 36 (1997), *summarily aff'g* 978 F. Supp. 96, 110-11, 118 (E.D.N.Y. 1997) (three-judge court) (invalidating district that was at points "one-block long," and "curve[d] and

Two other units commonly used by states in redistricting -- precincts and census tracts -- go far to alleviate the concerns raised by this Court regarding the use of census blocks because they provide larger, organic units with which to construct a district. To begin with, the use of precincts and census tracts helps ensure that the state is sensibly grouping voters instead of dividing them by race. Precincts follow local political boundaries, and census tracts are neatly nested within political subdivisions. *See* Bureau of the Census, U.S. Department of Commerce, Guidelines for Delineating Census Tracts and Block Groups 5 (June 1985) [hereinafter "Census Tract Guidelines"] ("[t]he county line always is a census tract boundary"). Moreover, census tracts are drawn by the Census Bureau to represent socially homogenous populations, and their borders tend to be easily recognizable natural or man-made features. *See* Census Tract Guidelines at 5 ("Census tract boundaries follow permanent, visible features, such as streets, roads, highways, rivers, canals, railroads, high-tension power lines, and so forth."); *id.* at 10 ("census tracts should comprise, as far as practicable, a population having similar socioeconomic and housing characteristics"); *see also Wilson v. Eu*, 823 P.2d 545, 552 (Cal. 1992) (approving use of census tracts to draw district lines because they are "'homogenous as to social characteristics,' and are bounded by 'prominent natural or manmade geographical features'") (citations omitted). In essence, census tracts are what we colloquially refer to as

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weave[d] among street blocks" to pick up minority voters); *Meadows v. Moon*, 117 S. Ct. 2501 (1997), *summarily aff'g* 952 F. Supp. 1141, 1147 (E.D. Va. 1997) (three-judge court) (invalidating district drawn "based upon race at the census block level to divide precincts and apportion large numbers of voters based on race into, and out of, the [challenged district]"). By contrast, the Court has affirmed a district court decision declining to apply strict scrutiny to districts designed to augment minority electoral strength when the districts were drawn using whole, undivided census tracts. *Infra* pp. 16-17.



"neighborhoods," or what *Miller* described as "communities [of interest] defined by actual shared interests," 515 U.S. at 916. *See Wilson*, 832 P.2d at 552 (keeping intact census tracts preserves communities of interest). Districts constructed using precincts or census tracts, then, are unlikely to convey an impermissible message to voters wondering why they fall on one side of the district line or the other.

Moreover, appropriate, nonracial information is available for each precinct and census tract, thus making it less likely that an impermissible message will be conveyed. Precincts allow a redistricter to construct a district using election data, which are legitimately considered in any line-drawing decision. *See Bush*, 517 U.S. at 964-65 (plurality opinion). Even more information is available to the redistricter at the census-tract level, including detailed socioeconomic and demographic information. *See Lawyer*, 117 S. Ct. at 2195 (approving district that was drawn along socioeconomic lines).[9] Both thus help ensure that race is not seen as a "proxy" for voter behavior, as occurs when a state redistricts using census blocks for which only racial information is available. *See Bush*, 517 U.S. at 961-62 (plurality opinion) (contrasting use of the "uniquely detailed racial data" available at census-block level with the broad range of "party registration and past voting statistics" and "demographic information" available at the precinct or census-tract level).

Furthermore, precincts and census tracts are substantially larger than census blocks, which have served as the basis for drawing each of the majority-minority districts struck down by this Court. *See supra* note 8. According to figures provided by

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[9] Even when precincts do not correspond exactly with census-tract lines, a redistricting program can aggregate precinct-level election results for each census tract so that voting data is available at the tract level.

the Geography Division of the Census Bureau, there are approximately 220,000 census blocks in North Carolina. By contrast, there are only about 1,500 census tracts and 2,200 precincts in North Carolina. *Compare Wilson*, 823 P.2d at 571 (California contains 400,000 census blocks but only 6,000 census tracts). Reliance on census tracts and precincts effectively forecloses the degree of racial fine-tuning that the Court condemned in *Bush*, 517 U.S. at 961-64, 972-76 (plurality opinion), and helps ensure that congressional districts are not dramatically irregular, *see id.* at 972-76 (plurality opinion) (concluding that jagged boundaries signal predominance of race). *See also* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2516 (1997) (attributing significant increase in bizarrely shaped districts in 1990s to "technological improve[ments]" that allowed for more fine-tuned line-drawing).

The use of undivided census tracts, in particular, goes far to guarantee that districts will be reasonably compact and will not contain the type of jagged edges that signal egregious race-based line-drawing.[10] That fact is confirmed by the decision of the three-judge court in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily affirmed by this Court, 515 U.S. 1170 (1995). Using whole census tracts to draw district lines, *see DeWitt*, 856 F. Supp. at 1413-15; *Wilson*, 823 P.2d at 549-50, redistricters drew 17 districts containing a minority population that was greater than 35% but less than 50%.[11]

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[10] Of course, where, as here, the state is forced in the middle of a decade to draw districts on an expedited basis and wishes to do so largely along partisan lines, using precincts is the most administratively efficient means to do so.

[11] *See Wilson*, 823 P.2d at 568 (text of Special Masters' Report) ("we have aimed to maximize the voting potential of a geographically compact minority group of any appreciable size even where it would not constitute a majority in the particular district"); *id.* at 598 (providing racial breakdown of congressional districts).



Even though the State's deliberate efforts to group together minority voters resulted in the creation of some "elongated districts," *Wilson*, 823 P.2d at 579-80 (text of report by Special Masters), the districts' "perimeter scores" -- one measure of compactness -- were quite high. *See Expressive Harms*, 92 Mich. L. Rev. at 549 (perimeter score is low if "district's borders wander around in contorted way"); *id.* at 565 (listing districts with lowest perimeter scores).[12] Moreover, as noted by the California Supreme Court, districting using census tracts "'aid[s] in establishing natural, well defined legislative districts and . . . in obtaining valid pertinent socioeconomic data about such districts.'" *Legislature v. Reinecke*, 516 P.2d 6, 17 (Cal. 1973) (quoted by Special Masters in *Wilson*, 823 P.2d at 570). Under these circumstances, as a plurality of this Court has explicitly recognized, *see Bush*, 517 U.S. at 958, the district court was correct to decline to subject the challenged districting plan to strict scrutiny. *See DeWitt*, 856 F. Supp. at 1413-15.

For these reasons, the kind of showing necessary to trigger strict scrutiny for a district designed to foster interracial coalition building would be virtually impossible where, as here, the lines were based on existing precincts or census tracts, rather than smaller units like census blocks. The use of appropriate geographic units such as precincts or census tracts virtually guarantees that the resulting district will *not* signal that race was the overriding factor in a state's redistricting calculus. Districts that foster interracial coalition building and are

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[12] Indeed, the only California district to be classified among the Nation's least compact districts received a low perimeter score due to topography, not gerrymandering. *See Expressive Harms*, 92 Mich. L. Rev. at 565-66 & n.234.

constructed from either of these two geographic units, then, should be deemed presumptively constitutional.

### C. The Court Should Explicitly Adopt a Presumption of Constitutionality in Favor of Districts Like District 12.

*Amici* urge the Court to announce a very strong presumption of constitutionality in favor of districts where it is undisputed that the supposedly favored racial group does not have a controlling electoral majority and the state has redistricted using sensible, organic geographic units like precincts or census tracts. While such a presumption is certainly implicit within the Court's prior decisions and, indeed, mandated by the principles of *Shaw*, one cannot underestimate the importance of expressly providing this type of clear guideline to states and courts facing the next round of redistricting after the 2000 Census. Without a clear legal presumption designating those instances in which the use of race is permissible and those in which a state relies on race too heavily, it is possible that, as here, *Shaw* will be read to require the application of strict scrutiny to districts throughout the country, regardless of their racial make-up. *But see Miller*, 515 U.S. at 928-29 (O'Connor, J. concurring) ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts. . . . That is so even though race may well have been considered in the redistricting process."). States facing the same redistricting challenges as North Carolina will be forced to redistrict without having any confidence that the federal district court reviewing their plan will not make the same mistakes made in this case.

Even if the Court were ultimately able to correct all of the mistaken district court decisions like this one, the Court's



failure to provide such a presumption today would inevitably distort the redistricting process. Indeed, because redistricting "cases are exceptionally charged politically, racially, and ethnically," *Principled Limitations*, 106 Yale L.J. at 2550, doctrinal ambiguities create an incentive for parties to seek through the courts what they could not obtain at the bargaining table, and thus will skew the bargaining process itself. *Id.; see also Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) (rebuking plurality for inviting "the losing party or the losing group of legislators . . . to fight the battle anew in federal court"). For these reasons, this case provides an ideal opportunity to provide a workable framework for future efforts to ensure that minority voters have an equal opportunity to participate in the political process and to elect candidates of their choice.

## II. THE FACTS ON WHICH THE DISTRICT COURT RELIED DO NOT COME CLOSE TO JUSTIFYING ITS FINDING OF LIABILITY.

Applying the presumption articulated above, the District Court plainly erred in summarily concluding that District 12 violated *Shaw*. Where, as here, a state has merely created a district in which all racial groups can engage in productive coalition building and has done so using appropriate geographic units, only the most egregious departures from traditional districting practices would signal that race was its overriding concern. Here the District Court did find that the State had drawn District 12 along racial lines. But the District Court did not – and could not – conclude that the State segregated voters on a block-by-block basis, failed to use appropriate geographic units in creating the district, or engaged in some other sort of

egregious racial line-drawing.[13] That is because the State consistently employed whole, undivided precincts in constructing District 12,[14] and the district's boundary betrays none of the racial fine-tuning evident in other *Shaw* cases.

Instead, the District Court rested its finding of liability on the shape of the district, the splitting of political subdivisions, and the State's exclusion of certain supposedly "heavily Democratic" precincts. But even assuming that the State deliberately drew District 12 to facilitate racial coalition-building, these facts would not begin to show that the State's consideration of race was so excessive that the three-judge court was justified in summarily invalidating the district. To the contrary, it remains clear that the predominant factor underlying the creation of District 12 was politics, not race.

The District Court's conclusion that race predominated in the drawing of District 12 was based in large part on the district's elongated shape and the fact that it split a number of

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[13] The State presented direct evidence that the General Assembly was predominantly motivated by partisan concerns. J.S. App. at 69a-78a (Affidavit of Senator Roy A. Cooper, III); *id.* at 79a-84a (Affidavit of Representative W. Edwin McMahan). It also submitted an expert report confirming that partisan concerns, not race, best explain the inclusion and exclusion of precincts around the district's border. J.S. App. at 85a, 87a-88a, 98a-99a (Affidavit of Dr. David Peterson). The District Court's disregard of this evidence plainly contravened the requirements of Rule 56 of the Federal Rules of Civil Procedure. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *see also Miller*, 515 U.S. at 915 ("until a claimant makes a showing sufficient to support [his or her] allegation, *the good faith of a state legislature must be presumed*") (emphasis added).

[14] Of the scores of precincts in and around District 12, the district split only one. The 1997 plan as a whole split only two of North Carolina's approximately 2200 precincts.



cities and counties. But because districts like District 12 convey a message of racial cooperation, not division, even an express decision to create such an elongated district could not, without more, signal that race was the "overriding factor" in the State's redistricting calculus. *See Wilson*, 823 P.2d at 579-80 (text of Special Masters' Report) (acknowledging that "elongated" districts in plan resulted from redistricters' efforts to augment minority voting strength); *DeWitt*, 856 F. Supp. at 1415 (declining to apply strict scrutiny to districting plan drawn by Special Masters in *Wilson*).

It would be especially inappropriate to infer illicit intent from the district's shape here because that shape was dictated by the State's efforts to create a district in which the Democratic incumbent could be reelected. Indeed, *any* Democratic-leaning district in this part of North Carolina would, by necessity, resemble District 12 because Democrats in that area are clustered in medium-sized cities, with fairly sparse, Republican-dominated populations between them. For example, it was not possible to draw a Democratic district that includes all of Charlotte and Mecklenburg County, nor was it possible to do so entirely in Guilford and Forsyth Counties.[15] Thus, the only sensible way to draw a Democratic-leaning

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[15] The General Assembly could not draw a Democratic district located entirely in Guilford and Forsyth Counties because, according to 1996 U.S. House election results, those counties have voted heavily for Republicans in congressional elections. *See* http://www.sboe.state.nc.us/results9/ushouse.htm (visited Nov. 4, 1998) (official website of the North Carolina State Board of Elections) (county-by-county vote totals for each congressional race). Similarly, it could not draw a Democratic district that included all of Mecklenburg County (and thus all of Charlotte) because such a district would have given Republicans a significant advantage, *see id.*, and would have pitted District 12's Democratic incumbent Mel Watt against his neighbor, District 9's Republican incumbent Sue Myrick, who represents more than two-thirds of Mecklenburg County.

district was to do exactly what the State did here: include the Democratic parts of both areas by drawing a district that stretched from Charlotte in the south to the Piedmont Triad (Greensboro, Winston-Salem, and High Point) in the north, taking care not to pick up too many Republicans between those two metropolitan areas. Such a district would have to extend a fair distance across the region, split a number of counties and cities, and be narrow at points -- all major elements of the District Court's decision to invalidate the 1997 legislative plan. *See* J.S. App. 19a-22a.

That fact is confirmed by the 1998 court-ordered plan ultimately approved by the District Court. Even in that plan, where the court found that race had *not* predominated, J.S. App. 175a, 178a-179a, the new District 12 is still elongated, remains narrow in several places, and splits only one fewer county. More importantly, these "improvements" were made to the 1997 legislative plan only at the expense of significantly *weakening* Democratic voting strength in the district, lowering the margin of victory for Democratic candidates by 14 percentage points when compared to the 1997 legislative plan. *See* http://www/ncga.state.nc.us/.html1997/geography/html3.2/main.html/ (visited Nov. 4, 1998) (official website of North Carolina General Assembly) [hereinafter "NCGA Website"] (providing district-by-district election results for 1997 legislative plan and 1998 court-ordered plan). Thus, the predominant reason for the shape of District 12 was political, not racial.[16]

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[16] Plaintiffs offer a different justification for the District Court's conclusion, one that cannot be squared with the District Court's approval of the 1998 court-ordered plan. They argue that, regardless of the State's motives, any remedial plan that retains the "core" of a previously invalidated district necessarily carries the "taint" of the former violation and is therefore unconstitutional as the "'fruit of the poisonous tree.'" That is incorrect. Had a federal court instead of the state legislature drawn a remedial district, it would have been *required* to do precisely what plaintiffs argue that the State cannot: retain as much of the old plan as possible in remedying the constitutional violation. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam) (court may make only those changes "*necessary* to cure [the] . . . defect" and is "not free . . . to disregard the political program of the [state legislature]"); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (remedial plan may not "intrude upon the state policy any more than necessary"); *White v. Weiser*, 412 U.S. 783, 793-95 (1973) (court must choose remedial plan that most closely resembles state's preference so long as it remedies constitutional violation). Given that a federal court would be required to maintain the core of District 12 in fashioning a constitutional remedy, it is beyond cavil that the state legislature has a similar power. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (a "State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"); *see also Lawyer*, 117 S. Ct. at 2191-92, 2195 (approving legislative plan that retains core of prior unconstitutional district, including a substantial portion of minority voters); *Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993) ("Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. *But that does not mean that the State's powers are similarly limited. Quite the opposite is true* . . . .") (emphasis added).

Nor does *Abrams* provide any support for plaintiffs. The Court did not question, let alone overrule, the well-established principle that a court must defer to legislative preferences in adopting a remedial plan. *See Abrams v. Johnson*, 117 S. Ct. 1925, 1933 (1997). Instead, it considered how to assess the legislative preference given the Department of Justice's interference with Georgia's redistricting judgments. *See id.* (distinguishing case from *Upham* because the plan purportedly expressing the legislative preference was enacted due to improper pressure from the Department of Justice). In the present case, there is absolutely no evidence of Justice Department interference. *See* J.S. App. 31a-33a.



More fundamentally, the District Court's heavy emphasis on the State's splitting of political subdivisions was wrong as a matter of principle. An illicit motive cannot be inferred from a state's decision to use precincts or census tracts rather than large subdivisions like counties and cities as the foundational

unit for drawing districts. That is because cities and counties are generally too large and heterogeneous to provide suitable "building blocks" for redistricting. Because of their size, they are routinely split simply to satisfy other districting criteria. For example, "[t]he policy of maintaining the inviolability of county lines . . . , if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote." *Connor v. Finch*, 431 U.S. 407, 419 (1977). Indeed, there are more than 80 counties in the United States that are too large to be placed in a single congressional district, and roughly 40% of the U.S. population resides in those counties. *See The World Almanac and Book of Facts 1998*, at 376, 420-38 (1997). Because state legislative districts are usually much smaller than federal ones, the splitting of counties and cities becomes even more inevitable in drawing the former.

Similarly, these types of political subdivisions often contain distinct communities of interest that are more sensibly grouped into separate districts -- for example, poor, urban residents may have little in common with wealthy suburbanites living in the same county. *See Lawyer*, 117 S. Ct. at 2195 (approving creation of district that split three counties where members "share a similarly depressed economic condition and interests that reflect it") (citations omitted). Finally, local officials often prefer to have their city or county divided among several congressional districts to "maximize" their points of access to Capitol Hill. Given the legitimate reasons a state like North Carolina has to selects precincts (or census tracts) instead of cities and counties as the foundation for its redistricting plan, it



was plainly inappropriate for the District Court to premise *Shaw* liability on the State's decision to make this reasonable choice.[17]

Finally, the District Court also inferred an illicit racial motive from the boundary of District 12 because the State excluded 32 predominantly white precincts that the court deemed to be "heavily Democratic" precincts based on *voter registration* data. The court erred for two reasons. First, of the 32 supposedly "heavily Democratic" precincts that the District Court claimed were wrongly excluded from District 12, J.S. App. 8a-9a, all but one were *less* Democratic -- even by the Court's incorrect measure -- than the district itself. *Compare* NCGA Website (indicating that the Democrats comprised 71.27% of registered voters in the 1997 version of District 12) *with* J.S. App. at 8a-9a (listing registration rates for 32 excluded precincts, 31 of which were less than 67% Democratic). Thus, their inclusion would have substantially *weakened* Democratic voting strength in District 12.

Second, as Judge Ervin sensibly explained in his dissent, registration data is a terribly misleading predictor of federal election results because "registered Democrats are not compelled to vote for Democratic candidates and often do not." J.S. App. 37a. Democratic registrants outnumber Republicans by more than two-to-one in North Carolina, yet Republicans have won most U.S. Senate elections there since 1970 and all but one Presidential race since 1964. Indeed, all twelve

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[17] Nor is it clear that political subdivisions like cities and counties do much to aid the *Shaw* inquiry. Because these kinds of political subdivisions vary tremendously in geographic size and population density, it is very difficult to make comparative judgments about decisions to split them. *See Bush*, 517 U.S. at 963 (plurality opinion) (noting that line-drawing decisions create different appearances in "large, densely populated urban counties" than in rural areas).

congressional districts used in the 1998 elections would be designated "Democratic" by the District Court's faulty measure, *see* NCGA Website (listing district-by-district registration rates for 1998 plan), yet seven of those seats were captured by Republicans this fall. In short, the election returns on which the informed political actors who drew the challenged plan actually relied, *see* J.S. App. at 73a, not partisan registration rates, are plainly the appropriate measure for assessing Democratic strength in District 12.[18]

There were, to be sure, a handful of majority-Democrat precincts (measured by election results) left out of District 12. But that fact says nothing about whether partisan concerns primarily determined the shape of District 12. To the contrary,

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[18] Appellees have tried to downplay the significance of the District Court's error by arguing that the 1990 race between former Mayor Gantt and Senator Helms is the only relevant race for gauging Democratic strength. *See* Appellees' Motion to Dismiss Or, in the Alternative, Affirm, at 25 (filed Aug. 26, 1998). But the state legislators who drew District 12 were plainly correct to rely on the results of other races as well. Indeed, while the Gantt-Helms numbers may provide an adequate basis for comparing the relative Democratic strength of precincts in the area, they are certainly not a good way to assess the likelihood that a Democrat will be elected in a congressional race. That is because Gantt, the former mayor of Charlotte and an extremely popular figure in the area, had a "home turf" advantage over Helms -- an advantage that would not be shared by a Democrat running in a congressional race, where *both* candidates would be from the area. The benefit of Gantt's regional ties is confirmed by the fact that Gantt performed *worse* than the average Democrat in nine of North Carolina's districts, but *better* than the average Democrat in the two districts where he had a home turf advantage: Districts 12 and 9. *See* NCGA Website (listing district-by-district election results for 1998 plan). It would be as problematic to call these precincts "Democratic" based on Gantt's performance as it would be to conclude that Arkansas is a wildly Democratic state in presidential elections just because then Governor Clinton beat President Bush there by 18 points. *See* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, at 115 (1997).



it generally is in the Democrats' interest to leave out such precincts once a sufficiently "Democratic" district has been created. The addition of any other Democratic voters would result only in "packing," thereby wasting Democratic votes. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (describing similar phenomenon for racial groups). Precisely the same incentives would have been at work for the GOP because moving any more "Democratic" precincts into District 12 would have resulted in "packing" more Republican voters in the surrounding districts (District 5, 6, 9, and 10).

In any case, it was surely inappropriate to invalidate North Carolina's preferred redistricting plan because the three-judge court disagreed as to the placement of a handful of the many precincts in District 12. The test for assessing the validity of the 1997 legislative plan is whether race was the *predominant* motive for a state's line-drawing decisions. *Miller*, 515 U.S. at 915-16. Liability cannot hinge upon the State's placement of a few precincts. *See Bandemer*, 478 U.S. at 133 (plurality opinion) ("[i]nviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature"); *id.* at 147 (O'Connor, J., concurring in the judgment) (concurring with this view out of concern that "[f]ederal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation"). That is especially true where, as here, an examination of all of the relevant precincts *in toto* reveals a predominantly partisan rather than racial motive. *See* J.S. App. at 85a, 87a-88a, 98a-99a (Affidavit of Dr. David Peterson); *see also Bush*, 517 U.S. at 963-64 (plurality opinion) (holding that political considerations such as incumbency protection and preserving a partisan balance are traditional districting practices that can justify a misshapen district).

Indeed, if the constitutional validity of a district were to hinge upon this type of microanalysis, it would undermine the very principles announced in *Shaw*. Every time a redistricter included or excluded a precinct for any reason, the state would have to compare that precinct's racial make-up to those falling on the other side of the line. Worse, the state would be required to *alter* any race-neutral decision that violated whatever racial bottom-line a district court might demand. In short, a principle established to discourage the excessive consideration of race in redistricting would instead mandate it.

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Although the errors in the District Court's opinion are easily refuted, they signal the serious risks facing states during the next round of redistricting. In their efforts to enforce the Equal Protection Clause, federal district courts are all too likely to substitute their judgments regarding these complex questions for those of experienced political actors. States thus face the risk that, as in this case, *Shaw* liability will be premised on minor departures from standards the state chose not to use and could not hope to anticipate. The greatest assistance the Court could provide to states and courts alike is to articulate clear legal presumptions and standards regarding *Shaw*'s application to majority-white districts drawn to include a sizeable minority population. *See Bush*, 517 U.S. at 993 (O'Connor, J., concurring) (proposing "workable framework" for evaluating majority-minority districts). *Amici* submit that the presumption articulated here provides this type of workable framework. Accordingly *amici* strongly urge its explicit adoption.



## CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

J. GERALD HEBERT
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585

PAUL M. SMITH*
DONALD B. VERRILLI, JR.
HEATHER K. GERKEN
JENNER & BLOCK
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

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* Counsel of Record